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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.A., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.A., Defendant and Appellant.	F058470 (Super. Ct. No. 07CEJ600137-7) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. James M. Petrucelli, Judge.

Shannon Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dana R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Supervising Deputy Attorney General, Lloyd G. Carter and Lewis A. Martinez , Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, A.P.J., Dawson, J., and Hill, J.

Following a contested jurisdiction hearing, the juvenile court found true an allegation that appellant A.A., a minor, committed assault by means of force likely to cause great bodily injury, in violation of Penal Code section 245, subdivision (a)(1) (section 245(a)(1)). At the subsequent disposition hearing, the court adjudged appellant a ward of the court and ordered him committed to the Department of Corrections and Rehabilitation, Juvenile Justice (DCRJJ), and declared appellant's maximum period of physical confinement to be six years four months, less 251 days of credit for appellant's predisposition custody.

On appeal, appellant contends the evidence was insufficient to support the instant adjudication; the evidence supports adjudication of only simple assault and therefore appellant's commitment to DCRJJ must be reversed; and he was entitled to predisposition credit of 838 days, not 251 days as found by the court.

FACTS

On May 20, 2009, at the Fresno County Juvenile Justice Campus (JJC), Probation Officer Nay Lee was escorting a group of minors to class when two of the minors, E.J. and R.H., became "engaged in a physical altercation."[1] Officer Lee ordered all the minors in the group, one of whom was appellant, to lie on the ground in the "yard check" position; in that position, a minor lies on his stomach with his hands clasped behind his head. Initially, E.J. and R.H. failed to comply, so Officer Nee sprayed them in the "facial area" with pepper spray.

Eventually, all the minors in the group complied. However, at one point thereafter, appellant stood up, ran over where E.J. was lying on the ground, and "started kicking him in the face." Appellant kicked E.J. "[a]bout three or four times." Appellant

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[1] Except as otherwise indicated, our factual statement is taken from Officer Lee's testimony.

was wearing JJC-issued rubber-soled shoes; these shoes "[a]re not soft shoes, ... [and] they're not hard shoes, but they're somewhat soft." They are "like tennis shoes." The blows delivered "were somewhat medium kicks." Officer Nay opined, "I don't know if they were hard or soft, but they were kicks like intention [*sic*] to harm somebody." E.J. "stayed still on the ground," with his hands "[i]nterlocked, over his head," while appellant was kicking him.

E.J. testified to the following. After the altercation he was taken back to his "pod." He was not taken to the hospital. He was "punched" in the initial altercation, and thereafter he was "maced," but after that, when he was lying on the ground he felt "nothing," and "[his] body was numb because [he] didn't feel anything." Asked if he "[felt] hits to any other part [of his body] while ... in the yard check position," he answered, "Yes, I got scraped in my hand, and that's it." He suffered no "cuts." He did not see who punched him initially; he did not see the faces of "any of the people around [him]," and he saw nothing once he went into the yard check position.

DISCUSSION

Sufficiency of the Evidence

As indicated above, appellant contends the evidence was insufficient to support his adjudication of violating section 245(a)(1). Specifically, he argues that although there is no dispute the evidence was sufficient to establish he kicked the victim repeatedly in the face, the evidence was insufficient to establish that the assault was by "means of force likely to produce great bodily injury," within the meaning of section 245(a)(1). We disagree.

A. Governing Principles

In determining whether the evidence is sufficient to support a juvenile court finding that a minor has committed a criminal offense, the reviewing court is bound by the same principles as to sufficiency and the substantiality of the evidence which govern

the review of criminal convictions generally. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) Those principles include the following:

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence-that is, evidence that is reasonable, credible, and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ... We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.'" (*People v. D'Arc*y (2010) 48 Cal.4th 257, 293.)

Section 245(a)(1) prohibits an assault "by any means of force likely to produce great bodily injury." "Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) And "'While it is true that "when the evidence shows that a blow has been struck or a physical injury actually inflicted, the nature and extent of the injury is a relevant and often controlling factor in determining whether the force used was of a felonious character" [citations], an injury is not an element of the crime, and the extent of any injury is not determinative.... The issue, therefore, is not whether serious injury was caused, but whether the force used was such as would be likely to cause it." [Citations.]'" (*People v. Roberts* (1981) 114 Cal.App.3d 960, 965; accord, *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161-1162 ["The essential determination is whether the force was likely to produce great bodily injury rather than the actual injury incurred"].) If, however, injury is inflicted, it may be considered in connection with other evidence to determine if the assault was of the sort likely to cause great bodily injury. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087.)

"The force likely to produce great bodily injury can be found where the attack is made by use of hands or fists. [Citation.] Whether a fist used in striking a person would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied. [Citation.]" (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748-749.) Similarly, a defendant's act in kicking the victim with shod feet has been found sufficient to support a conviction for assault by means of force likely to produce great bodily injury. (*People v. Roberts, supra,* 114 Cal.App.3d at p. 965; see also *Gonns v. United States* (10th Cir. 1956) 231 F.2d 907, 908 [violation of section 245(a)(1) "may be committed by striking with the hand or fist, kicking, choking, or other comparable means."])

B. Analysis

Appellant, in support of his claim that the evidence was insufficient to establish that the assault he committed was by means of force likely to cause great bodily injury, asserts as follows: "the only evidence presented of the amount of force actually exerted by [appellant] during the assault was the officer's testimony that they were 'somewhat medium kicks'; the victim did not "feel any assault," suffer any injury as a result of the assault or seek medical attention; and appellant was wearing "soft rubber soles."

These points are not well taken. First, appellant understates the evidence with respect to appellant's shoes. Officer Lee testified they were "somewhat soft." He likened them to tennis shoes. Footwear of that sort can hardly be characterized as so soft as to be incapable of causing serious injury if used to kick a person repeatedly in the face, even if the kicks are delivered with "medium" force.

Second, the court was not compelled to credit the victim's testimony that he felt "nothing." E.J. also testified he did not see the faces of any of the minors in the group of which E.J. was a part and with whom he was on his way to class. The juvenile court

reasonably could have found that E.J. was not being entirely truthful, in an attempt not to be seen as an informer.

But more fundamentally, appellant's argument gives insufficient weight to the "the manner in which [the force] was used and the circumstances under which [it] was applied." (*People v. McDaniel*, *supra*, 159 Cal.App.4th at pp. 748-749.) In *People v. Roberts*, *supra*, 114 Cal.App.3d at page 965, this court stated: "In our case, the kicking on the head and torso of a largely defenseless man on the ground appears to us to be unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm. And here, of course, the injuries inflicted bear out that fact. In addition to the cuts and bruises and the unconsciousness produced, the victim received a blow to the forehead which produced a large welt. If this blow had struck the nearby eye, it might well have produced blindness in that eye, surely a great bodily injury."

We recognize that the victim in *Roberts* suffered significant injuries, whereas there was no evidence of any injury to E.J. resulting from the instant assault. Nonetheless, we find it significant that E.J., like the victim in *Roberts*, was kicked, and kicked repeatedly, in an area of vulnerable, vital body parts. In our view, the juvenile court reasonably could have found that *multiple* kicks to the head, by an assailant wearing rubber-soled shoes similar to tennis shoes, delivered with a "medium" degree of force, constituted an assault by mans of force sufficient to put out an eye or break the victim's nose. Such force is force likely to cause great bodily injury within the meaning of the statute.[2]

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[2] Because we find the evidence sufficient to support appellant's adjudication of assault by means of force likely to cause great bodily injury, we also reject appellant's contention that the DCRJJ commitment must be reversed and the instant offense reduced to simple assault.

Predisposition Credit

A juvenile is entitled to credit against his maximum period of physical confinement for any time he spends in actual custody prior to disposition. (*In re Eric J.* (1979) 25 Cal.3d 522, 536 (*Eric J.*).) "A juvenile's entitlement to predisposition custody credit is determined by Welfare and Institutions Code section 726." (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067 (*Emilio C.)*.) That section provides, in relevant part: "If the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602, the 'maximum term of imprisonment' shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code ...." (Welf. & Inst. Code, § 726, subd. (c).) Under Penal Code section 1170.1, a sentence for multiple felonies comprises the "principal" term, "subordinate" term, and any additional term imposed for applicable enhancements. The principal term consists of the greatest term of imprisonment imposed by the court for any of the crimes. (Pen. Code, § 1170.1, subd. (a).) The subordinate term for each consecutive offense consists of one-third of the middle term of imprisonment prescribed for each felony conviction. (*Ibid*.) Subordinate misdemeanor terms are calculated as one-third of the maximum term for such offenses. (*Eric J.*, *supra*, 25 Cal.3d at pp. 536-538.)

The juvenile court here elected to aggregate the periods of confinement on the instant offense and offenses adjudicated in two prior proceedings, and arrived at a maximum period of confinement of six years four months, calculated, pursuant to Penal Code section 1170.1 and *Eric J.*, as follows: four years on the instant offense; eight months on each of two offenses--violations of Vehicle Code sections 10851, subdivision (a)(1) and 2800.2, subdivision (a)--alleged in the wardship petition filed December 30, 2008; eight months on a violation of Penal Code section 69 alleged in the wardship

petition filed February 8, 2009; and four months on a violation of Penal Code section 594, subdivision (a)(2) alleged in that same petition.

Appellant contends the court erred in failing to award additional predisposition custody credit of 587 days, which he calculates as follows: 135 days, credited at a disposition hearing on October 20, 2008; 260 days, credited at a disposition hearing on November 29, 2009; 192 days, for the period from November 29, 2007, to June 8, 2008. However, as appellant does not dispute, none of this time in custody for which he seeks additional credit was based on offenses upon which the court based its determination of appellant's maximum period of confinement. And, as the court noted in *Emilio C.*, "[In *Eric J.*] [t]he California Supreme Court ... concluded that when a juvenile court elects to aggregate a minor's period of physical confinement on multiple petitions pursuant to these foregoing statutory provisions, the court must also aggregate the predisposition custody credits *attributable to those multiple petitions*. [Citation.]" (*Emilio C.*, *supra*, 116 Cal.App.4th at p. 1067, italics added.) Thus, appellant is not entitled to credit for these periods against the maximum period of confinement declared by the court. (*Ibid.)*

DISPOSITION

The judgment is affirmed.